IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-841

LESTER L. FULTON,
Respondent,

vs.

INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,
Petitioner.

On Petition for Writ of Certiorari to the
Supreme Court of the United States

PETITIONER'S REPLY BRIEF

Respondent's Brief Fails to Address the Constitutional Issues Raised in the Petition for Certiorari

The crux of the petition for certiorari in this case is that petitioner was denied due process because it was not given notice of the hearing on damages and was therefore deprived of the opportunity to prevent the improper entry of judgment on a cause of action or causes of action not pleaded in the respondent's complaint. Although the petition for certiorari thus raises

a novel question of whether the Missouri courts provided sufficient notice to petitioner in default proceedings, respondent's answering brief to this court remarkably fails to confront this question.

Instead, respondent's brief clouds the issues in this proceeding by misstating certain important aspects of the circumstances surrounding this litigation. Thus respondent's brief at page 2 makes the extraordinary contention that "defendant had more notice to appear to defend at a hearing on June 28, 1973, to prove up the plaintiff's damages than has ever been required by the United States Constitution." This statement is not accurate. The record is clear that petitioner never received *any* notice of the June 28 hearing (or respondent's memorandum of law filed at that hearing), and was therefore deprived of its right: (1) to test respondent's evidence of damages; or (2) to contest the propriety of proving damages on causes of action not pleaded in the complaint and of which petitioner had no prior notice. Indeed, at this June 28 hearing the lawsuit was fundamentally transformed from one based upon the Missouri Service Letter Statute, Mo. Rev. Stat. § 290.140, into litigation for breach of an employment contract and tort.

Petitioner submits that a significant question of constitutional law is involved here. Even a party against whom an interim default judgment has been entered deserves constitutional protection from having its ultimate and final liability on an interim judgment determined without its participation when the final judgment is based upon damages arising from causes of action not asserted in the complaint. Without notice of the hearing on damages or the memorandum of law filed by respondent, petitioner was unable to protect itself from the gross and fundamental irregularities at the June 28 hearing, *on which the final judgment against petitioner was based.* Yet respondent's brief fails utterly to discuss the propriety and constitutionality of a court entering judgment for $96,000 against a defendant with-

out providing any notice to the defendant of the plaintiff's proof of damages or the shift in the theories of recovery.

Respondent makes a considerable effort to prove in its brief that the original house counsel handling this matter for petitioner was remiss in allowing the interim default judgment to be entered. But no amount of proof of negligence can obscure the fundamental constitutional principle that a judgment entered without notice and opportunity to be heard is void. *Wooden v. Friedenburg*, 198 S.W.2d 1 (Mo. 1946); *State ex rel. Rhine v. Montgomery*, 422 S.W.2d 661 (Sprg. Ct. App. 1967). Petitioner respectfully submits that, regardless of why petitioner's counsel failed to appear to prevent the entry of the interim judgment, the failure to provide petitioner notice of the subsequent damage hearing on June 28, 1973, at which respondent obtained recovery on causes of action not pleaded, rendered the final judgment for damages void. No amount of proof of negligence can legitimize, justify, or immunize from attack a judgment which is void.

Furthermore, respondent does not effectively respond to the second aspect of petitioner's stated grounds for requesting certiorari; namely, that the final judgment and damages entered thereon in the respondent's action was based upon a cause of action or causes of action not set forth in respondent's original complaint. Respondent implies at pages 10 and 11 of his brief to this court that petitioner has somehow distorted the basis for the trial court's judgment after the June 28 hearing. Thus respondent asserts that the petitioner has sought to "ferret out isolated matters of evidence and imply that the Court relied on certain specific items of evidence in arriving at its decision" at the June 28 hearing. But the transcript of the June 28 hearing and the respondent's very memorandum of law submitted to the court at that hearing show that the trial court's judgment *must* have been based upon causes of action not set forth in respondent's complaint.

As was stated in petitioner's petition for certiorari at 9, "the plaintiff failed to prove any loss of employment opportunity based upon a failure to provide a service letter," the only cause of action stated in respondent's complaint. Since such proof was utterly lacking in the proceedings before the trial court and since that is the only ground upon which damages pursuant to the Missouri Service Letter Statute can be based, it is apparent that the trial court's judgment must have been based upon causes of action not stated in the complaint. Accordingly, since petitioner had no prior notice of such causes of action, the judgment is constitutionally defective. *Reynolds v. Stockton*, 140 U.S. 254, 270 (1891).

Respectfully submitted

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